Supreme Court, U.S.
FILED
SEP 22 2008
OFFICE OF THE CLERK

No. 08-223

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MCWANE, INC., ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF PETITIONERS IN NO. 07-1512 IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the "significant nexus" standard described by the opinion concurring in the judgment in *Rapanos* v. *United States*, 547 U.S. 715, 767 (2006) (Kennedy, J.), establishes the exclusive rule of law for determining whether particular streams are "waters of the United States" covered by the Clean Water Act (CWA), 33 U.S.C. 1362(7), even in cases where CWA coverage has been established under the standards adopted by the four-Justice plurality in *Rapanos* and by the four *Rapanos* dissenters.

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INTERESTS OF AMICI CURIAE

Amici are the petitioners in the pending case of *United States* v. *Lucas*, No. 07-1512.[1] As the United States recognizes in its petition (at 30 n.10), *amici's* petition presents the same essential issue that the United States presents here: specifically, which of the alternative standards articulated in *Rapanos* v. *United States*, 547 U.S. 715 (2006), governs the lower courts in determining the extent of federal jurisdiction under the Clean Water Act (CWA).

In addition to the *Marks* issue presented in both petitions, however, *amici* have also presented a separate question that would allow the Court to articulate the proper interpretation of whichever of the *Rapanos* standards the Court selects. And *amici's* case involves the scope of federal jurisdiction, not over perennially flowing streams, as in this case, but over wetlands—an area of far greater practical and legal importance.

Unlike the respondents in this case, moreover, the individual *amici* are currently serving prison terms based upon the lower courts' misinterpretation of the Clean Water Act and each of the standards articulated in *Rapanos*. As a direct result, one of the individual *amici*—Robbie Wrigley—is now being deprived of the opportunity to raise her young son to adolescence. And the other two individual *amici*—Robert Lucas and M.E. Thompson—are being deprived of the

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[1] The parties have consented to the filing of this brief. Under Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or its counsel made a monetary contribution to preparation or submission of this brief.

opportunity to spend their sunset years with family and friends. *Amici* therefore have a powerful interest in helping this Court provide needed guidance to lower courts—including those that have previously addressed the *Lucas* case—in determining the extent of federal jurisdiction under the Clean Water Act, particularly in the wetlands context.

ARGUMENT

As noted, the Government here seeks certiorari to determine how to interpret this Court's fractured decision in *Rapanos*, while the *Lucas* petitioners seek certiorari on that question as well as the broader question of *how* whichever standard the Court selects should be understood and applied. For that and other reasons discussed in Section I below, it makes sense for the Court to grant both petitions and consider them in tandem. Alternatively, as explained in Section II (and in the attached reply filed in support of *amici*'s petition), if the Court wishes to grant only one of these petitions, it should grant the *Lucas* petition, which provides a superior vehicle with which to resolve these difficult questions.

I. The Court should grant both petitions and consider them in tandem.

Amici agree with the Government that the *Marks* question presented in this case is the subject of an acknowledged and mature circuit conflict and is, in addition, an issue of profound practical importance—not only to the Government, but to businesses and other property owners throughout the nation. Indeed, according to the Environmental Protection Agency, as many as 300 million acres of wetlands blanket the United States, a third of them in the lower 48 states. EPA, *Wetlands: Status and Trends*,

http://www.epa.gov/OWOW/wetlands/vital/status.html (last updated Feb. 22, 2006). Depending on how the Government's jurisdiction is defined, moreover, it may exercise control over as little as 20 percent or as much as 90 percent of those wetlands. See Jon Kusler, Association of State Wetland Managers, *The SWANCC Decision: State Regulation of Wetlands to Fill the Gap* 6-8 (March 2004), at http://www.aswm.org/fwp/swancc/aswm-int.pdf. The extent of federal jurisdiction under the CWA is therefore a matter of critical importance in need of this Court's attention. See *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 678 (1979) ("Because this holding affects property rights in 150 million acres of land * * *, we granted certiorari.").

The very importance of that issue, however, especially in the wetlands context, demands rejection of the Government's attempt to confine this Court's consideration to a single case arising in the quite different context of discharges directly into a perennial stream. The more sensible approach is to grant both petitions and hear them in tandem.

That approach is in keeping with the Court's past practice in analogous cases. Often during the past several Terms, when the Court has received two nearly simultaneous petitions raising similar or closely related issues, the Court has granted *both* petitions and considered the two cases in tandem. See, *e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and *Gratz* v. *Bollinger*, 539 U.S. 244 (2003) (considering in tandem two cases involving the constitutionality of affirmative action programs); *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 477 (2003) and *United States* v. *Navajo Nation*, 537 U.S. 488, 493 (2003) (considering in tandem suits over whether the

Government violated fiduciary duties to two native tribes); *Lockyer* v. *Andrade*, 538 U.S. 63 (2003) and *Ewing* v. *California*, 538 U.S. 11 (2003) (deciding in tandem two criminal cases involving California's "three-strikes" law); *Van Orden* v. *Perry*, 545 U.S. 677 (2005) and *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005) (hearing in tandem two cases on the public display of the Ten Commandments); *Hammon* v. *Indiana*, 547 U.S. 813 (2006) and *Davis* v. *Washington*, 547 U.S. 813 (2006) (deciding in tandem whether statements in a 911 call and to police constituted testimonial statements under *Crawford* v. *Washington*, 541 U.S. 36 (2004)); *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) and *Meredith* v. *Jefferson County Bd. of Educ.*, 127 S. Ct. 2738 (2007) (considering in tandem whether school policies aimed at racial desegregation were unconstitutional); *Gonzales* v. *Carhart*, 127 S. Ct. 1610 (2007) and *Gonzales* v. *Planned Parenthood*, 127 S. Ct. 1610 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003 in tandem cases).

This procedure—hearing two closely related cases in tandem—has allowed the Court to consider the common issues more thoroughly and, ultimately, to give more comprehensive guidance to lower courts as to how to apply the legal standards the Court has adopted. For example, in *Grutter* and *Gratz*, both cases presented the broad issue of how to assess the constitutionality of affirmative action programs in higher education. Accordingly, the Court *could* simply have granted one of the cases and held the other pending the outcome of the first. But the two cases presented the affirmative action issue in two distinct contexts—one in the context of a law school admissions program that considered race subjectively, as

one of several factors; and the other in the context of a more objective undergraduate admissions program that automatically gave racial minorities a specific number of "points" based on the applicant's minority status. Given the differing factual settings in which the common issue arose, and the opportunity that both cases offered for providing guidance to the lower courts, the Court sensibly granted both petitions and heard the two cases in tandem.

Similar opportunities are offered by the two CWA cases now before the Court—this case and *Lucas*. Here again, the Court *could* simply grant one and hold the other pending decision in the first. But, as in *Grutter* and *Gratz* (and the other cases listed above), considering both cases together offers distinct advantages.

First, simultaneous consideration will allow the Court to more readily consider the scope of federal jurisdiction under the Clean Water Act in *both* of the contexts in which that issue arises most frequently—discharges into perennially flowing streams (as in this case) and the much more important context of discharges into wetlands—the context in *Lucas*. As another group of *amici* here have explained, "it is important to review CWA jurisdiction as it applies to *all* types of water bodies." Brief of *Amicus Curiae* American Farm Bureau Federation et al. (hereinafter "AFBF Brief"), No. 08-223, at 8 n.5.

Consideration of the jurisdictional question in the context of flowing streams alone—as the Government seeks here—would risk the adoption of a legal analysis that is both incomplete and less well suited to the wetlands context. For example, a decision in this case as to whether a perennially flowing stream con-

stitutes "waters of the United States" would not resolve the vexing and recurring issue of what it means for a *wetland* to be "adjacent" to navigable waters or their tributaries, and hence to constitute a "water of the United States" in its own right. See *Rapanos*, 547 U.S. at 728 (Scalia, J. plurality); *id.* at 760 (Kennedy, J. concurring); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). Nor would this case give the Court an opportunity to resolve a key issue presented by the *Rapanos* plurality and concurrence, namely, how close and continuous a connection there must be between a wetland and a "relatively permanent" body of water. See AFBF Brief at 16-19; Brief of *Amicus Curiae* National Ass'n of Homebuilders and Chamber of Commerce of the United States, No. 07-1512, at 13-16.

For all these reasons, simultaneous consideration of both cases offers the best chance of ensuring that the Court fully appreciates both contexts and crafts its analysis in a way that is well suited to both.

Second, simultaneous consideration of both cases will allow the Court to more readily consider the views of two different courts of appeals as to the proper legal standard. As explained in the *Lucas* reply brief (Appendix A at 8a-9a), the courts of appeals in these two cases adopted very different interpretations of the *Rapanos* plurality. And, as shown in the *Lucas* reply (App. A at 11a-12a), the lower courts are in disarray as to the proper understanding of the concurrence's "substantial nexus" standard. Furthermore, especially in the wetlands context, the Government has construed the scope of this test extremely broadly, well beyond any reasonable construction of the *Rapanos* concurrence. See AFBR Brief at 7-8. Simultaneous consideration of both

cases will thus make it easier for the Court, in responding to these divergent views, to articulate exactly what its chosen standard means, and how that standard (or those standards) is to be applied.[2]

Third, as explained in the *Lucas* reply brief (App. A at 15a-16a), simultaneous consideration of both cases will ensure that at least one party before the Court is defending each of the three positions offered by the various *Rapanos* opinions. In this case, the Government will no doubt continue to urge adoption of the *Rapanos* dissent—*i.e.*, that federal jurisdiction exists when the standard adopted by *either* the plurality or the concurrence is satisfied. Similarly, because of the Eleventh Circuit's observation that the Government had satisfied the *Rapanos* plurality, but *not* the concurrence, the respondents here will have a powerful incentive to urge the adoption of the concurrence alone. Thus, if the Court were to grant review in this case but hold *Lucas*, none of the *parties* before the Court would likely defend the *Rapanos* plurality. By contrast, the *Lucas* petitioners intend to argue—based in part on the rule of lenity—that, at least in the criminal context, the *Rapanos* plurality should control.

In all of these respects, moreover, this case differs markedly from *Rapanos*, in which the Court consoli-

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[2] Indeed, even if the Government were correct that *Lucas* is not the most "appropriate" vehicle for resolving the *Marks* question presented in both petitions—because the Fifth Circuit did not choose a single legal standard—that alleged deficiency would be eliminated by granting both petitions, considering them in tandem, and then using *Lucas* (at a minimum) as a vehicle for determining the proper understanding of whichever standard the Court chooses. But in any event, the Government's premise is wrong: As explained in the *Lucas* reply (at 3-4), *Lucas* is a perfectly appropriate for resolving the *Marks* issue as well.

dated the two underlying cases rather than consider them in tandem. Unlike these cases, both of the cases at issue in *Rapanos* arose in the wetlands context. See 547 U.S. at 729-730. Unlike these cases, moreover, both of the underlying cases in *Rapanos* had been decided by a single circuit—the Sixth—under the same legal standard. And unlike these cases, the landowners there did not have divergent legal interests, and were not pressing for materially different standards.

For all these reasons, the Court should grant both this petition and the *Lucas* petition, and hear both cases in tandem.

II. If the Court nevertheless wishes to limit itself to one case, it should grant the *Lucas* petition.

If the Court decides to grant only one petition, however, it should grant the *Lucas* petition. As explained in greater detail in the *Lucas* reply (App. A), *Lucas* is a superior vehicle for resolving the difficult questions of the Government's jurisdiction in Clean Water Act cases.

First, unlike this case, *Lucas* (as noted) involves discharges into what the Government claims are jurisdictional wetlands, which this Court has recognized as raising significant constitutional questions. See *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality); *id.* at 782 (Kennedy, J., concurring); see also App. A at 7a-8a. As *Rapanos* attests, moreover, interpreting the CWA in the wetlands context is in general more challenging—not just for the courts, but for governmental and private actors alike. And, as noted, the wetlands context is far more important as a practical matter than the flowing streams context—given that

the former context potentially comprises hundreds of millions of acres of land. Accordingly, if the Court were to choose only one CWA case to hear and decide on the merits, it would make far more sense to choose a wetlands case than a flowing streams case.

Second, the Eleventh Circuit here only applied the *Rapanos* plurality, whereas the Fifth Circuit in *Lucas* purported to apply both the *Rapanos* plurality and concurrence. *Lucas*, therefore, offers this Court an opportunity to provide lower courts with guidance on the proper application of either of those standards. It also gives this Court the opportunity to address the proper standards to apply to residential septic systems—also an issue of enormous practical importance. See App. A at 8a-9a.

Finally, because the *Lucas* petitioners were sentenced to long prison terms based solely on the Government's expansive interpretation of the CWA, that case brings into sharper focus the substantial liberty and due process interests implicated by a decision on the scope of the federal government's jurisdiction. See Appendix A at 14a-15a. Those interests are more readily apparent in the *Lucas* case, in which, as noted, the Fifth Circuit's misinterpretation of the CWA means that a young child must now grow up to adolescence without his mother's care, and two grandfathers may spend most if not all of their remaining twilight years in prison, without the company of family and friends.

CONCLUSION

For all these reasons, the Court should grant the petition and hear this case in tandem with *United States* v. *Lucas*, No. 07-1512. Alternatively, the

Court should hold this petition pending a decision on the merits in *Lucas*.

Respectfully submitted,

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SEPTEMBER 2008

APPENDIX

APPENDIX A

No. 07-1512

In the Supreme Court of the United States

ROBERT J. LUCAS, JR., *ET AL.*, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTRODUCTION

The Government acknowledges that the issue of "the standard or standards to be used in determining" the coverage of the Clean Water Act (CWA) "under the fractured decision in *Rapanos*"—the fundamental question presented in this case—is the subject of "an acknowledged circuit conflict" and otherwise "a matter of exceptional importance." No. 08-223, *United States* v. *McWane, Inc.* (filed August 21, 2008), at 14-15 & 30n.7; *accord* Opp. 14. The Government also does not dispute that *this* case offers the Court a fair opportunity to resolve that issue and bring needed clarification to the scope of federal jurisdiction under the CWA. The Government, however, argues that *McWane* is "a *more suitable* vehicle" solely because the Fifth Circuit in this case held the evidence sufficient to satisfy the legal standards articulated by both the *Rapanos* plurality and the concurrence, whereas the Eleventh Circuit in *McWane* stated that there the difference between the plurality and concurrence in *Rapanos* "*may* be outcome-determinative." *Id.* at 31 n. 7 (emphases added).

This Court, of course, need not choose between these two "suitable vehicles": It can simply grant both petitions, as it did in *Rapanos*. In so doing, the Court can ensure that *one* of the cases before it (this one) arises in the context of wetlands regulation, which—as *Rapanos*, *SWANCC*, and *Riverside Bayview Homes* confirm—is both more recurring and of greater concern from a constitutional and policy standpoint than the regulation of direct discharges into flowing "open water." By granting both petitions, moreover, the Court can ensure that *one* of the Government's opponents—petitioners here—will vig

orously urge adoption of the *Rapanos* plurality. But even if the Court felt compelled to choose between the two cases, this case, not *McWane*, would provide a more suitable vehicle to resolve the question presented in both petitions, while at the same time allowing the Court to decide two additional questions that are likewise of exceptional importance to property owners nationwide.

ARGUMENT

If the Court is going to expend the resources to determine which of the *Rapanos* opinions provides the controlling standard—as it well should—the Court will undoubtedly want to provide additional guidance on the proper *application* of whichever standard the Court chooses. Such additional guidance may even prove helpful (and perhaps crucial) to the Court's ability to reach a majority position. Yet in these respects, *McWane* is less "suitable" than this case.

1. First and foremost, *McWane* involved discharges into an open, flowing body of water—Avondale Creek—rather than, as here, a normally dry "wetland" that the EPA nevertheless considers a "water of the United States." Accordingly, any additional guidance provided in *McWane* about the meaning of the chosen legal standard is less likely to help lower courts determine the scope of federal jurisdiction over wetlands—the very context in which the constitutional and federalism concerns about the CWA are most acute. See, *e.g.*, *Rapanos*, 547 U.S. at 721-22 (Scalia, J., plurality opinion); *id.* at 776 (Kennedy, J., concurrence); *SWANCC*, 531 U.S. at 174 (noting "significant constitutional questions" in the regulation of wetlands).

Federal jurisdiction over wetlands, moreover, implicates far more property, and property owners, than federal jurisdiction over flowing streams. Indeed, the nation has an estimated 100 million acres of wetlands, and approximately 75% of the wetlands in the lower 48 states are on private property. Congr. Res. Service, *Report for Congress, The Wetlands Coverage of the Clean Water Act Is Revisited by the Supreme Court: Rapanos* v. *United States* 6, 10 (Jan. 3. 2007). As a result, unlike flowing streams, there are an enormous number of disputes, in a variety of contexts, involving the federal government's jurisdiction over wetlands. *Id.*; see also *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 678 (1979) ("Because this holding affects property rights in 150 million acres of land * * *, we granted certiorari.").

2. Ironically, the only fact that the Government cites in arguing that this case is less "suitable" for resolving the scope of federal CWA jurisdiction—the fact that the Fifth Circuit purported to apply both the *Rapanos* plurality and the concurrence without deciding which standard controls—is one of the very things that makes this case a superior vehicle.[1] Although the Eleventh Circuit in *McWane* did opine on the meaning of the *Rapanos* plurality (and in a way that conflicts with the Fifth Circuit's decision in this case, see, *infra*, at 8-9), it did not opine on the meaning of the concurrence's "substantial nexus" standard. Indeed, the jury instruction in *McWane* did not attempt

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[1] Nor is there anything unusual in this Court's granting certiorari to resolve one vexing issue in circumstances that require the Court to also resolve another issue. See, *e.g.*, *Quanta* v. *LG Electronics*, 128 S. Ct. 2109 (2008); *Virginia* v. *Black*, 538 U.S. 343, 363, 367 (2003).

to articulate the "substantial nexus" standard, and the Government's witnesses did not attempt to establish such a nexus. Thus, the Eleventh Circuit simply had no occasion to apply that standard to the facts there.[2]

Here, by contrast, the court of appeals purported to apply both the *Rapanos* plurality's standard and the "substantial nexus" requirement. See Pet. App. 11a-12a. For that reason, this case gives the Court a clearer opportunity, once it has selected the governing standard, to provide needed guidance on the meaning and proper application of that standard.

3. The Government is also incorrect in contending (at 18) that, aside from the first question presented, this petition raises only "factbound challenges" that "implicate no issue of continuing importance." In fact, unlike *McWane,* this case not only gives this Court an opportunity to address the critical issue of whether residential homeowners and developers must obtain *federal* permits to install and operate or

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[2] It is, of course, entirely *possible* that the Court could provide additional guidance as to the proper application of the "substantial nexus" standard if it granted the *McWane* petition and ultimately adopted that standard. And it is likely that the Court would provide additional guidance if it decided in *McWane* to adopt the standard of the *Rapanos* plurality. Accordingly, if the Court were to grant review in *McWane*, it should, at a minimum, hold this case pending decision in *McWane*.

On the other hand, if the Court elects to grant both petitions and consider both cases together, it should not consolidate the cases because the interests of the two sets of defendants are not sufficiently aligned to warrant joint briefing and oral argument. See, *e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003); *Gratz* v. *Bollinger*, 539 U.S. 244 (2003). The Court should instead simply consider the cases in tandem.

dinary residential septic systems (Pet. Question 3 & 26-33),[3] it also gives the Court an opportunity to address critical *legal* issues in the proper applications of both the *Rapanos* plurality and the concurrence—the subject of the second question presented.

As explained in the petition (at 20-21), the critical *legal* error in the Fifth Circuit's application of the "substantial nexus" standard is its utter failure to require that the connection between the wetland at issue and a traditionally navigable body be "significant" or "substantial"—as the *Rapanos* concurrence expressly requires. *See* 547 U.S. at 780. But the Government simply ignores this problem: It points to nothing in the Fifth Circuit's opinion requiring (or holding) that the alleged, generic effect of these wetlands in "controlling flooding" and "preventing pollution" (Opp. at 16) was "significant" or "substantial." It points to no evidence from which the Fifth Circuit *could* have made such a finding. And it completely ignores the district court's express findings indicating

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[3] The Government attempts to minimize the significance of the Fifth Circuit's holding on this point primarily by arguing that septic systems are point sources only in "rare circumstance[s]" because they "do not generally discharge pollutants directly into 'waters of the United States.'" Opp. 19. But that argument assumes that the sweeping interpretation of "waters of the United States" that the Government advanced in this case, and in *Rapanos*, is wrong. As the *Rapanos* plurality pointed out, under the Government's interpretation (as under the decision below), virtually "the entire land area of the United States" would constitute "waters of the United States" subject to federal jurisdiction. 547 U.S. at 722. And that of course would mean that vast numbers of residential septic systems *do*, in fact, "discharge pollutants directly into 'waters of the United States.'" Opp. 19.

that no such evidence was ever presented.[4] See Pet. 20-21.

Accordingly, if the Court decides to adopt the *Rapanos* concurrence, this case, unlike *McWane*, presents a clear opportunity to address a clean legal question about the proper application of the concurrence in this and all future cases: Does the CWA require the Government to demonstrate a "significant" or "substantial" effect on a downstream traditionally navigable water, and if so, what does that mean in the wetlands context?

Contrary to the Government's bald assertion (at 15), this is obviously a question of "continuing importance." Indeed, it has bedeviled not only the lower courts, but also the very federal agencies that the Government represents here. See Pet 16n.2 (collect

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[4] The Government's assertion (at 5) that, in addition to engaging in discharges in violation of the CWA, petitioners "defrauded hundreds of individuals who purchased house lots ... in reliance on petitioners' false representations that the sites were habitable" is dead wrong. In fact, petitioners' mail fraud convictions were based upon sales of 18 specific home lots (not hundreds), which the Government claimed were wetlands subject to the EPA's jurisdiction, and, largely for that reason, were "uninhabitable." And that is no doubt why the district court repeatedly recognized that *all* of the claims against petitioners, including the mail fraud claims, were premised upon federal jurisdiction under the Clean Water Act. See Pet App. 118a.

The Government, moreover, presented no evidence that any of these lots was "uninhabitable" in fact. To the contrary, as shown in Appendix A, to the extent there was evidence on the habitability of these 18 lots, it showed that they not only *were* habitable, but most were in fact *inhabited* at the time of trial. And those that were vacant at trial had been inhabited for substantial periods and were vacated for reasons unrelated to their habitability. See App. A.

ing cases); *United States* v. *Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (Torruella, J. dissenting) (criticizing the "significant nexus" test as "opaque"); Congr. Res. Service, *supra*, at Summary ("[T]he outer geographic limit of CWA jurisdiction * * * has challenged regulators, landowners and developers, and policymakers for more than 30 years.").

On the other hand, if the Court adopts the standard embraced by the *Rapanos* plurality, this case presents a clean legal issue about the meaning of that standard as well. As explained in the petition (at 21-25), the critical error in the Fifth Circuit's application of that standard was its assumption that a "continuous" surface connection can be established based on evidence of a connection that, although "continuous" in the spatial sense, is not "continuous" in the temporal sense. That is a flat misinterpretation of the "continuous surface connection" standard, which requires temporal as well as spatial continuity. See 547 U.S. at 742; American Heritage Dictionary of the English Language (4th Ed. 2006) (defining "continuous" as including not just physical continuity, but the quality of being "uninterrupted in time").

Here again, the Government's brief largely ignores this problem. Although the Government claims (at 17n.9) that its evidence established "persistent or perennial flows" between the wetlands and a relatively permanent body of water, the Fifth Circuit never articulated such a requirement, let alone made such a finding. See Pet. App. 11a-12a. And nothing in the Government's description of its own evidence establishes a temporally continuous surface connection between a relatively permanent body of water and these wetlands: The closest the Government

comes is a statement by one of its experts, based upon four visits to the property, that "the *tributaries*" running near the wetlands were "persistent or perennial." Opp. at 17n.9.

Here again, therefore, if the Court decides to adopt the *Rapanos* plurality's standard, this case will provide a clear opportunity to address a clean legal question about the meaning of that standard: Does the CWA require the Government to demonstrate a surface connection between the wetland and a relatively permanent body of water that is "continuous" both spatially and temporally? Or, as the Fifth Circuit assumed, is an intermittent but spatially continuous connection enough?

This too is a question of "continuing importance." *Compare* Opp. 15. Indeed, the same issue arose in *McWane* as a result of the district court's holding that the jury could find that the discharges were made into a "navigable water" even if the body of water into which they were made—Avondale Creek—flowed "only intermittently." *United States* v. *Robison*, 505 F.3d 1208, 1215 (11th Cir. 2007). Contrary to the Fifth Circuit's approach here, the Eleventh Circuit opined that this approach was inconsistent with the *Rapanos* plurality's standard—precisely because that standard requires temporal as well as spatial continuity. *Id.* at 1223-1224; see also, *e.g.*, *Simsbury-Avon Preservation Soc., LLC* v. *Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 229 (D. Conn. 2007) ("While plaintiffs have offered evidence showing that a surface water connection does *at times* exist, they offer no evidence demonstrating a continuous connection.") (emphasis added).

In short, the Fifth Circuit's opinion eviscerates the "substantial" component of the "substantial nexus" requirement of the *Rapanos* concurrence, and the court's assumption that a "continuous surface connection" does not require *temporal* continuity makes a mockery of the *Rapanos* plurality. It is therefore hardly surprising that the Government wishes to avoid having to defend the Fifth Circuit's analysis, which is squarely challenged in *petitioner's* version of the second question presented. Compare Pet. i with Opp. I.

4. As a vehicle for resolving the issues presented, this case is also superior to *McWane* because it brings into sharper focus the substantial liberty interests and due process concerns implicated by the Government's expansive interpretation of the CWA. Unlike the individual defendants in *McWane,* who were placed on probation, the individual petitioners here received—and are now serving—substantial prison terms, ranging from seven to nine years. Indeed, unless this Court vacates her conviction, one of the petitioners (Robbie Wrigley) will lose forever the opportunity to raise her son during the first seven years of his life—all because of an expansive interpretation of a law that all concede is ambiguous at best.

This case thus differs from *Rapanos,* which, as it came to this Court, involved only civil remedies, not criminal sanctions. The Court thus had no occasion to consider expressly the due process/fair notice issues presented by criminal prosecutions under a highly ambiguous statute, or the resulting requirement under the rule of lenity that, at least in that context, ambiguities be resolved, not in favor of the Government, but "in favor of the defendant." *United*

States v. *Bass*, 404 U.S. 336, 348 (1971); *see also* See *Smith* v. *Wade*, 461 U.S. 30, 41n.8 (1983) ("[I]n criminal law * * * terms [a]re generally more strictly construed than in civil law."); *United States* v. *Lanier*, 520 U.S. 259, 266-67 (1997); *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (U.S. 2008).

That is also why, although we believe petitioners would likely be vindicated under a proper application of the *Rapanos* concurrence—which the *McWane* defendants will necessarily endorse—we intend to argue on the merits that the *Rapanos* plurality should govern, at least in criminal cases, under the rule of lenity. See, *e.g.*, *Santos*, 128 S. Ct. at 2025 ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."). Certainly the fact that four Justices of this Court concluded that the CWA mandates the "continuous surface connection" requirement means that that interpretation is, at a minimum, a reasonable construction of the statute. See, *e.g.*, *Bell* v. *United States*, 349 U.S. 81, 83 (1955) (applying rule of lenity when the Court could "not unreasonably reach either of the conflicting constructions"). And certainly it is far easier for a landowner to determine in advance whether a wetland on her property has a (temporally and spatially) "continuous surface connection" to a relatively permanent body of water, than to determine whether her wetland bears a "substantial nexus" to a traditionally navigable body of water miles away.

Of course, a decision from this Court that both enforces and clarifies the "substantial nexus" requirement could ameliorate the ambiguity and uncertainty that currently exists under that standard. But at

this point, only the standard of the *Rapanos* plurality is sufficiently concrete and precise to pass muster under the due process principles and canons of construction applicable in the criminal context. And only the petitioners in this case (unlike the respondents in *McWane*) have any meaningful incentive to advocate that standard as controlling.

CONCLUSION

The Government's prosecution of the petitioners—and the Fifth Circuit's decision upholding several novel theories of liability—is unprecedented and, as the Government now admits (at 14), raises issues of "great practical importance." Unlike *McWane*, this case will permit the Court not only to resolve the *Marks* issue on which the courts of appeals are in express conflict, but also to articulate the proper understanding of whichever of the *Rapanos* standards the Court chooses, and to prevent the Government from subjecting virtually all who install or use residential septic systems to potential criminal liability for the resulting discharges.

The petition should be granted, and this case should either be briefed and argued along with *McWane*, or decided on its own.

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SEPTEMBER 2008

APPENDIX

APPENDIX A

HABITABILITY OF LOTS SUBJECT TO MAIL FRAUD CLAIMS

Lot	Original Owner	Purchased	Inhabited At Trial? (2005)	Transcript Cites
YY-12	Karen Reynolds	1999	Yes	429, 434-36, 449
AG-11	Jacqueline Peterson	1999	Yes	579-80, 595-96
KK-5	Nancy Watford	1998	No, but owner lived there until 2002, and no evidence tied the vacancy to habitability issues. Watford reaffirmed her lot debt in bankruptcy.	617-18, 645; 653
E-13	Patrick Brossett, Sr.	1997	Yes	2631-33; 2641
II-3 & II-2	Joseph Grayson	1997	Yes, and owner purchased a second lot.	1088-89; 1163-64; 1178-79
G-2B	Norris Jones	1998	Yes	1357, 1363-66
AA-17	Richard Wenniger	1998	Yes	1508, 1510, 1526, 1546, 1566-67
U-15	Phillip Johnson	1998	Yes	2756-58
U-15	Becky Anderson	2004	Yes	2892
AM-6	Dawn McNiece	2000	Yes	Sent. TR 115
M-6	Ruth Hayes	1997	Yes	1582
V-6	Christa Spence	1997	Yes	1745; 1753
O-1	Gwynn Spiers	1997	Yes. Current resident testified she had no problems with the lot or septic system.	1773-74; 1781-82; 4105-06
NN-9	Dee Micele	1998	Yes	1916; 1922; 1949

Lot	Original Owner	Purchased	Inhabited At Trial? (2005)	Transcript Cites
YY-15	Allen Patterson	1998	Yes	2461; 2487
GG-4	Patricia Griswold	1999	No. Owner lived there until 2004, and no evidence tied the vacancy to habitability. Griswold also reaffirmed her lot debt in bankruptcy.	2502-03; 2549
AF-18	Eleanor Johnson	1999	No. Owner's trailer was repossessed in 2003. No evidence tied the vacancy to habitability.	3729- 3305-06
LL-3	Steve Martin	2000	No. Owner was transferred by the Navy in 2003, and he rented out the property until August 2004. The lot was on sale at the time of trial. No evidence tied the vacancy to habitability issues.	3476; 3487; 4311-4312
YY-1 & YY-2	Henry Johnson	1999	No. Original owner moved in 2003, and renter lived there until owner evicted him before trial for failure to pay rent. No evidence tied the vacancy to habitability.	3729; 3305-06
AG-5	Dawn Sullivan	2000	Yes	3597-98; 617-18
JJ-6	Connie Taylor	2000	Yes	3725-26; 3772-73